82-1977

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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LOUIE L. WAINRIGHT
and JIM SMITH,

Petitioners,

vs.

CANDIDO GIARDINO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEAL ERRONEOUSLY FOUND THAT THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROVIDED STANDING FOR RESPONDENT, A WHITE, NON-LATIN, TO CHALLENGE THE UNDER-REPRESENTATION OF BLACKS AND LATINS ON THE STATE GRAND JURY WHICH INDICTED HIM WHEN (A) THIS COURT'S PRIOR DECISION IN CASTANEDA V. PARTIDA, 430 U.S. 482 (1977), HAS MADE IT CLEAR THAT THE QUESTION OF STANDING TO CHALLENGE THE COMPOSITION OF A STATE GRAND JURY SHOULD BE ANALYZED ONLY UNDER THE CONSTRAINTS IMPOSED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHERE SUCH ANALYSIS COMPELS THE CONCLUSION THAT THE RESPONDENT IS WITHOUT STANDING, AND (B) THE SYSTEM FOR SELECTING THE STATE PETIT JURY WAS NOT CHALLENGED?

2. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THAT OF A STATE COURT OF FINAL DECISION?

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PREFACE

The Petitioners, Louie L. Wainwright and Jim Smith, were the Appellees in the Eleventh Circuit Court of Appeals and the Respondents in the United States District Court for the Southern District of Florida. The Respondent, Candido Giardino, was the Appellant in the Eleventh Circuit Court of Appeals and the habeas petitioner in the United States District Court. For clarity, in this brief, the parties will be referred to as the State and the Defendant.

The following references is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A1-A42.

I

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida, and the Report of the United States Magistrate, which was adopted in the District Court's opinion is contained in the State's Appendix at "A7-A18" and is apparently unreported. The judgment and opinion of the Eleventh Circuit Court of Appeals is also not reported, and is contained in the State's Appendix at "A1-A6". The opinion of the District Court of Appeal of Florida, Third District, affirming the Defendant's conviction and sentence is reported at Giardino v. State, 378 So.2d 302 (Fla. 3d DCA 1979), and is contained in the State's Appendix at "A21-A22." The opinion of the District Court of Appeal,

Third District, upon which the Third District relied upon in Giardino v. State, supra, is reported at Barnason v. State, 371 So.2d 680 (Fla. 3d DCA 1979), and the relevant portion is contained in the State's Appendix at "A23-A26." The opinion of the Florida Supreme Court denying the Defendant's petition for writ of certiorari is reported at Giardino v. State, 389 So.2d 1110 (Fla. 1980) and contained in the State's Appendix at"A19-A20".

II

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit, was entered on April 5, 1983. No petition for rehearing was filed. This petition for certiorari was filed within the applicable time period. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional Provisions and statutes controlling the disposition of this cause are lengthy. See Amendments V, VI, and XIV of the Constitution of the United States, Title 18, United States Code, section 243, Title 28, United States Code, Section 2254, Chapter 70-1000, Laws of Florida and Chapter 57-550, Laws of Florida. The pertinent text of each, set out verbatim, appears in the Appendix at pages A27-A40.

IV

STATEMENT OF THE CASE

The Defendant was indicted by the Dade County Grand Jury and convicted after a jury trial of bribery, and unauthorized compensation for official behavior.[1] The Defendant, a white, non-latin, filed a pre-trial motion to dismiss the indictment on the basis that substantial underrepresentation of blacks and latins on the grand jury venire denied him due process and equal protection of the law. At the time the Defendant was indicted, grand juries in the Eleventh Judicial Circuit of Florida were selected pursuant to Chapters 70-1000 and 57-550, Laws of Florida. (A30-A40). These laws required state circuit judges to select qualified

[1]See Report of Magistrate at A9.

persons to serve as grand jurors. (A35-A37). From these submitted names a master list of 500 individuals was formed; vendires were then randomly selected from a "grand jury box" containing these names of the 500 individuals. (A37-A40).

The state trial court denied the motion to dismiss on the grounds that the Defendant waived the grounds asserted in his motion because he did not challenge the grand jury prior to its impanelment and because he later voluntarily gave testimony before it.[2] At no time did the Defendant challenge the composition of his petit jury.

On appeal, the District Court of Appeal of Florida, Third District, affirmed the Defendant's convictions

[2]See opinion of the Eleventh Circuit at A4.

and relying on its prior decision in Barnason v. State, 371 So.2d 680 (Fla. 3d DCA 1979), held that the Defendant lacked standing to allege that the composition of the grand jury which indicted him denied him equal protection. Giardino v. State, 378 So.2d 302 (Fla. 3d DCA 1980) (A21-A22). After denial of certiorari review by the Supreme Court of Florida, (A19-A20), the Defendant filed his petition for writ of habeas corpus, pursuant to 28 U.S.C. §2254, in the District Court.

The sole claim asserted in the petition was summarized by the United States Magistrate in her report as follows:

> The sole claim of this petition is that the indictment upon which Giardino was convicted was returned by a grand jury which was unconstitutionally selected and impaneled, in that

Blacks and Latins were substantially underrepresented in the list from which it was chosen.

A10.

The Magistrate in her report found that a defendant in a state criminal case has no Fifth Amendment right to indictment by a grand jury, but he does have a Sixth Amendment right to trial by an impartial jury since that right has been incorporated in the Fourteenth Amendment. The Magistrate, cited to Castaneda v. Partida, 430 U.S. 482, 509 (1976)(Powell, J. dissenting opinion) and held that a State defendant may challenge the composition of a grand jury only by alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. Therefore, because Castaneda required that a defendant show substantial underrepresentation of his race or of the identificable group to

which he belongs, the Magistrate held that the Defendant lacked standing to challenge the underrepresentation of blacks and latins. (A9-A18).

The Magistrate further distinguished Peters v. Kiff, 407 U.S. 493 (1973) on the basis that Peters permitted challenge by a state defendant of a grand jury on the basis of exclusion of persons of a race other than his. . .upon a Fourteenth Amendment due process rationale, "where the challenge involved arbitrary exclusion rather than underrepresentation." (A15)(emphasis in original). The District Court upon considering the Magistrate's Report, the Defendant's objections thereto, the State's Response, and the entire record, denied the petition for writ of habeas corpus. (A7-A8).

On appeal to the Eleventh Circuit Court of Appeals, the Circuit Court reversed the District Court, and held that despite the language in Castaneda v. Partida, supra, limiting the scope of Peters v. Kiff, supra to challenges only to exclusion of one's own race, the defendant had standing to assert his claim of systematic exclusion. In support of its holding, the Circuit Court cited two pre-Castaneda decisions, Ferguson v. Dutton, 477 F.2d 121 (5th Cir. 1973) and United States ex rel. Davis v. Henderson, 474 F.2d 1098 (5th Cir. 1973) and the recent decision in United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) which involved a challenge to the composition of a federal grand jury. (A3-A6). The State did not file for rehearing, but moved for a stay of the mandate. The Circuit Court

granted the motion for stay of the mandate, pending review in this Court. (A41-A42).

V

SUMMARY OF ARGUMENT

The Circuit Court has construed the requirements of the Fourteenth Amendment as it applies to challenges to the composition of a state grand jury in such a way that it conflicts with this Court's decision in Castaneda v. Partida, 430 U.S. 482 1977). Despite the language in Castaneda finding that a state defendant has no right to a grand jury that reflects a fair cross-section of the community, 430 U.S. at 510 (Powell, J., dissenting), the Circuit Court's has erroneously extended to state defendants the federal right to a "representative" grand jury that does not derive from the requirement of equal protection, but from the Fifth Amendment's explicit requirement of a grand jury.

The Fifth Amendment's right to a representative grand jury is similar to the Sixth Amendment right to a representative petit jury. However, the Sixth Amendment right to a representative petit jury, unlike that of the Fifth Amendment right to a grand jury, has been specifically made applicable to state proceedings by the Fourteenth Amendment. Compare Taylor v. Louisiana, 419 U.S. 522 (1975) and Duren v. Missouri, 439 U.S. 357 (1979) to Hurtado v. California, 110 U.S. 516 (1884). Thus, in a state case in which the defendant challenges the underrepresentation of certain races or classes, only the Equal Protection Clause of the Fourteenth Amendment applies. As this Court held in Castaneda v. Partida, supra at 494, the defendant, in order to show an equal protection violation must show that the procedure employed resulted in substantial underrepresentation of his

race or the identifiable group to which he belongs.

Further, the Circuit Court's construction and application this Court's pre-Castaneda plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972) is manifestly incorrect, where Peters involved a challenge to system for selecting both the grand and petit juries, and where this Court in Castaneda v. Partida, supra, defined Peters as a case involving absolute exclusion of an identifiable group, and not a case of substantial underrepresentation. 430 U.S. at 492-93. Thus, the Circuit Court has misapplied the holding of Peters v. Kiff, to the instant case which involves only a challenge to the grand jury and not to the system for selecting petit juries and further alleges only substantial underrepresentation, not absolute exclusion.

The extension of the fair cross section requirement to state grand juries by the Circuit Court is an issue of great importance to all state's which have instituted a grand jury system. This Honorable Court should correct the patent misconstruction by the Circuit Court of this Court's prior decisions and affirm the Florida appellate court's prior construction of the United States Constitution.

VI

ARGUMENT

The opinion of the Circuit Court in conferring standing to the Defendant, a white, non-latin to challenge the underrepresentation of blacks and latins on the state grand jury which indicted him is a manifest misapplication of this Court's decisions interpreting the Fourteenth Amendment as it applies to challenges to the compositions of state grand juries. The State submits that the Circuit Court's reliance on Justice Marshall's plurality opinion in Peters v. Kiff, 407 U.S. 493 (1972) is no longer sound in light of this court's later decisions in Castaneda v. Partida, 430 U.S. 482 (1977) and Rose v. Mitchell, 443 U.S. 545 (1979).

In Peters v. Kiff, supra, the defendant, a white challenged the system for

selection of both the grand and petit juries on the basis that the system resulted in the exclusion of blacks from the juries were in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Although, recognizing that neither the Fifth Amendment[3] or the Sixth Amendment[4] applied,[5] Justice Marshall, joined by Justices Douglas and Stewart, held that, "whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law." 407 U.S. at 504.

[3]Hurtado v. California, 110 U.S. 516 (1884).

[4]Peters involved a trial that took place before this Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968).

[5]407 U.S. at 496.

The difficulty of the precedential value of Peters, lies not in Justice Marshall's opinion, but rather in the concurring plurality opinion of Justice White, joined by Justices Brennan and Powell. In his opinion, Justice White, specifically noted that there were no cases setting aside a conviction for the arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the class,[6] and concurred in the opinion only because 18 U.S.C. 243, made it a

[6]Less than three months earlier, Justice White in his opinion for the Court in Alexander v. Louisiana, 405 U.S. 625 (1972) had held that a male had no standing to challenge the systematic exclusion of women on his grand jury, on the grounds that unlike the Sixth Amendment right to a petit jury which is fundamental to the scheme of justice and is guaranteed to defendants on state courts by the Due Process Clause of the Fourteenth Amendment, the Fifth Amendment's concepts of a grand jury are not obligatory for the states. 405 U.S. at 633-34.

federal crime for any state to disqualify any citizen for service on a grand or petit jury on the basis of race. 407 U.S. 505-507. Justice White believed that to implement the strong, statutory policy of §243, which reflected the central concern of the Fourteenth Amendment with racial discrimination, the defendant should be allowed to challenge the grand juries which indicted him on the grounds that blacks were arbitrarily excluded. Id. at 506-507.[7]

[7]Chief Justice Burger, along with Justices Blackmun and Rehnquist dissented, stating that the claim of prejudice to the white defendant from the exclusion of blacks from the jury was too speculative to raise the "probability of unfairness," required for a finding of a denial of due process. 407 U.S. 509-11. The dissent further stated that this Court should not expansively read §243, and that the ineffectiveness of the statutory sanctions for a violation of the statute are for Congress to correct, not this Court. Id. at 512-13.

Five years after Peters was decided, this Court rendered its opinion in Castaneda v. Partida, 430 U.S. 482 (1977). In an opinion authored by Justice Blackmun, the Court defined Peters v. Kiff, as a case involving "absolute exclusion of an identiable group." 430 U.S. at 493. The Court then stated that later cases had established the principal that substantial underrepresentation of a group constitutes a constitutional violation as well, if it resulted from purposeful discrimination. Id. The Court held that "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." 407 U.S. at 494. Thus, the opinion in Castaneda has limited

Peters to cases involving absolute exclusion, and requires substantial underrepresentation claims in state grand juries to be raised through an equal protection basis.

In his dissenting opinion in Castaneda, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, expanded on this view and held that although the Fifth Amendment right to a grand jury does not apply to a state prosecution, if a state chooses to proceed by grand jury it must proceed within the constraints imposed by the Equal Protection Clause of the Fourteenth Amendment. 407 U.S. at 509. Justice Powell concluded that although, a state defendant can complain that the state has denied him equal protection where purposeful discrimination has resulted only in substantial rather than total

exclusion of members of the defendant's class, he "has no right to a grand jury that reflects a fair cross-section of the community." In explaining the reasons for this distinction Justice Powell stated:

> The right to a "representative" grand jury is a federal right that derives not from the requirement of equal protection, but from the Fifth Amendment's explicit requirement of a grand jury. That right is similar to the right-applicable to state proceedings-to a representative petit jury under the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). To the extent that the Fifth and Sixth Amendments are applicable, a defendant need only show that the jury selection procedure "systematically exclude[s] distinctive groups in the community and thereby fail[s] to be reasonably representative thereof." Id. at 538, 95 S.Ct. at 702. But in a state case in which the challenge is to the grand jury, only the Fourteenth Amendment

> applies, and the defendant has the burden of proving a violation of the Equal Protection Clause.
>
> 407 U.S. at 510. [8]

To allow the Circuit Court's decision in the instant case to stand, the result would essentially emasculate any difference between the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment and would strip this Court's decision in Castaneda of any viability. Under Castaneda, in order to show a violation of the Equal Protection Clause, a defendant must show a substantial degree of underrepresentation of an identifiable class over a significant period of time. 430 U.S. at 494. A similar prima facie test is

[8]Although the Eleventh Circuit has not recognized this distinction, other district courts in other circuits have. See, e.g., Beal v. Rose, 532 F.Supp. 306, 311 (M.D. Tenn. 1981); Villafane v. Manson, 504 F.Supp. 78, 82 n. 6 (D. Conn. 1980).

employed in determining a violation of the fair cross section requirement of the Due Process Clause. See Duran v. Missouri, 439 U.S. 357, 364 (1979). The only distinction, which is significant is how that prima facie case may be rebutted. For an equal protection claim, the presumption can be rebutted by proving an absence of discriminatory intent. Castaneda v. Partida, 430 U.S. at 497-98. In a fair cross-section analysis, purposeful discrimination is irrelevant since the emphasis is purely on the structure of the jury venire; a prima facie case can be rebutted only by establishing a significant government interest which justifies the imbalance of classes. Duren v. Missouri, 439 U.S. at 367-68.

The danger of this merger of the two clauses of the Fourteenth Amendment

cannot be underestimated.[9] In Rose v. Mitchell, 443 U.S. 545 (1979), this Court recognized that because the principal purpose of the Equal Protection Clause was to protect against discriminatory action by the state on account of race, discrimination which if present in the administration of justice, casts doubt on the integrity of the judicial process. 443 U.S. at 554-56. These same concerns were expressed by Justice Marshall in his opinion in Peters v. Kiff, 407 U.S. at 502-503. With the recognition of these concerns, this Court in Rose v. Mitchell, reaffirmed its holding in Castaneda v. Partida, supra, that a defendant, in order to show a violation of the Equal Protection Clause must show substantial underrepresentation of his race or of the

[9]This danger was recognized by Justice Rehnquist in his dissent in Duran v. Missouri, 439 U.S. at 371-72.

identifiable group to which he belongs. 443 U.S. 565.

The purpose of the fair cross-section requirement of the Due Process Clause was derived from the Sixth Amendment guarantee of an impartial jury trial. Taylor v. Louisiana, 419 U.S. 522, 526 (1975). Allowing a defendant, as in the instant case to challenge the underrepresentation, not absolute exclusion, of groups or races other than his own on a state grand jury, where the system for selecting petit jurors is not challenged, would ill serve the purposes of the Due Process Clause. It would be an irrational method of vindicating what is in reality the equal protection rights of the underrepresented class to participate in the judicial process. This Court in Carter v. Jury Commission of Green County, 396 U.S. 320 (1970) has

recognized that injunctive relief is available to require states who provide for grand juries, to do so in a manner that is free of racial bias. 396 U.S. at 330. Reversal of a valid state conviction should not be required.

This analysis of the essential differences between a Due Process and Equal Protection claim was recognized by the Florida courts. See Giardino v. State, 378 So.2d 302 (Fla. 3d DCA 1980)(A21-A22) and Barnason v. State, 371 So.2d 680, 681 n. 2 (Fla. 3d DCA 1979)(A23-A26). Because the Circuit Court's opinion in the instant has rejected this analysis, it is a decision which conflicts with that of a state court of final decision, see Williams v. Florida, 399 U.S. 78 (1970); Nash v. Florida Industrial Commission, 389 U.S. 235 (1967) and this Court should take jurisdiction to decide this manifestly important issue.

CONCLUSION

The State submits there is an issue of great public importance herein in the context of challenges to a state grand jury system. The application by the Circuit Court of Peters v. Kiff in light of this court's later decisions in Castaneda v. Partida and Rose v. Mitchell cannot stand. To allow the Defendant, a white, non-latin to have standing to challenge the underrepresentation, not absolute exclusion, of blacks and latins on the state grand jury which indicted him, especially in light of the fact that the system used for selecting the petit juries, has not been challenged, would blur any viable distinctions between the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, rendering this Court's decisions in Castaneda v. Partida moot. This Court

has jurisdiction and should take jurisdiction over this matter of compelling national importance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5906
Non-Argument Calendar

D.C. Docket No. 81-01137-CIV-EBD

CANDIDO GIARDINO,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida, Et Al.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 23;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court.

April 5, 1983

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5906
Non-Argument Calendar

CANDIDO GIARDINO,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, et al.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

(April 5, 1983)

Before HILL, KRAVITCH and HENDERSON,

PER CURIAM:

The sole issue before us on appeal is whether petitioner, a white male, may challenge underrepresentation of blacks and Latins on the grand jury venire. Pretrial, in Florida state court, petitioner sought dismissal of the indictment on the grounds pf substantial underrepresentation. The state trial judge refused to permit discovery or an evidentiary hearing, and denied the motion to dismiss on the ground that petitioner waived the claim by appearing and testifying before the grand jury. Post-conviction the Florida District Court of Appeals held petitioner lacked standing to challenge the grand jury selection process, and denied the appeal. The Florida Supreme Court denied certiorari.

Petitioner then sought a writ of habeas corpus in the United States District Court for the Southern District

of Florida. The magistrate also determined that Giardino lacked standing, and recommended denying the petition. On review of the entire record, including petitioner's objections to the magistrate's report, the district court denied the writ. Giardino appeals.

Despite opinions below, which interprets at great length the Supreme Court's opinions in Peters v. Kiff, 407 U.S. 493 (1972) (plurality holds criminal defendant, no matter what his race, may challenge systematic exclusion of any race from grand jury pool) and Castaneda v. Partida, 430 U.S. 482 (1977) (language indicating scope of Peters narrowed to permit challenge only to exclusion of one's own race), the issue presented here is settled in this circuit. In United States v. Perez-Hernandez, 672 F.2d 1380, 1385 (11th Cir. 1982) we analyzed the

same Supreme Court cases and determined that an hispanic male could challange the exclusion of blacks and women from the position of grand jury foreman. Perez-Hernadez governs this case, and is the law of the circuit. See also Ferguson v. Dutton, 477 F.2d 121 (5th Cir. 1973) (whites have standing to challenge exclusion of blacks from grand jury that indicted them); United States ex rel. Davis v. Henderson, 474 F.2d 1098, 1100-01 (5th Cir. 1973) (same) We hold that petitioner has standing to assert his claim of systemic excluion. Therefore we remand for consideration of the other issues raised in this appeal.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-1137-CIV-EBD

CANDIDO GIARDINO,

Petitioner,

vs. ORDER

LOUIE L. WAINWRIGHT, etc., and JIM SMITH, etc.,

Respondents.

_____/

THIS MATTER is before the Court on Petitioner's Objections to Magistrate's Report, pursuant to Title 28, United States Code, Section 636(b)(1)(c). Magistrate Charlene H. Sorrentino entered the Report on November 19, 1981, recommending that the petition for writ of habeas corpus be denied.

Upon consideration of the Report, the Objection, the Response and the

entire Record, as well as being advised in the premises, it is

ORDERED AND ADJUDGED that the petition for writ of habeas corpus is hereby DENIED.

DONE AND ORDERED in Miami, Florida, this 5th day of March, 1982.

Edward B. Davis
UNITED STATES DISTRICT JUDGE

Copies To:

Anthony Musto, Esq.
Michael Zelman, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-1137-CIV-EBD

CANDIDO GIARDINO, Petitioner, vs. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections and JIM SMITH, Attorney General, State of Florida, Respondents.	REPORT OF UNITED STATES MAGISTRATE

Candido Giardino, who is represented by the Public Defender for the Eleventh Judicial Circuit of Florida, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his convictions for bribery and unauthorized compensation for official behavior, entered on March 9, 1979, after jury trial in Case No. 77-4260-A in the Circuit Court of the Eleventh Judicial

Circuit of Florida, at Dade County. He was sentenced to concurrent terms of six months to four years incarceration, and is presently serving these sentences at the Miami North Correctional Center, Miami, Florida.

This cause has been referred to the undersigned for preliminary consideration and report, pursuant to 28 U.S.C. §636(b)(1)(B).

The respondent has filed a response to an order to show cause. Both sides have filed numerous documentary exhibits.

The sole claim of this petition is that the indictment upon which Giardino was convicted was returned by a grand jury which was unconstitutionally selected and impaneled, in that Blacks and Latins were substantially underrepresented in the list from which it was chosen.

Giardino was indicted on June 2, 1977. On June 23, 1977, he filed a motion to dismiss the indictment upon the basis raised in this federal petition. Essentially, the Florida law then in effect permitted Circuit Judges to submit names of individuals believed by them to be morally fit, and grand jury venires were formed from these submissions.

On September 12, 1977, the Circuit Judge denied the motion to dismiss on the basis that it was not timely filed pursuant to Fla.Stat. §905.05. No evidentiary hearing was held.

The issue was preserved by Giardino on direct appeal. The state, in its Brief of Appellee, argued as to this issue that; 1) Giardino, as a white, non-Latin male, had no standing, and 2) the motion was not timely filed pursuant to Fla.Stat. §905.05.

The Florida Third District Court of Appeal did not mention the issue of timeliness, ruling instead that Giardino lacked standing to raise the issue, and affirming the convictions. Giardino v. State, 378 So.2d 302 (Fla. 3 Dist. 1979). The Florida Supreme Court denied certiorari. Giardino v. State, 389 So.2d 1110 (Fla. 1980).

It is apparent that all state remedies have been exhausted as to the issue raised in this petition.

It further appears that the state courts have correctly applied the applicable federal Constitutional principles.

Giardino is a white, non-Latin, male. The thrust of his claim is that the selection process utilized by the state at the time of his indictment resulted in grand juries upon which Blacks and Latins were substantially underrepresented.

The cases treating jury challenges involve three federal Constitutional Amendments.

A defendant in a federal criminal case has both a Fifth Amendment right to indictment by a grand jury in a felony case and a Sixth Amendment right to trial by an impartial jury. A defendant in a state criminal case has no Fifth Amendment right to indictment by a grand jury. Castaneda v. Partida, 430 U.S. 482, 509 (1976)(Dissenting opinion); Hurtado v. California, 110 U.S. 516 (1884). He does, however, have a Sixth Amendment right to trial by an impartial jury, since that right has been incorporated in the Fourteenth Amendment. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

The state defendant's Sixth Amendment right to trial by an impartial jury has been the basis for cases such as

Duren v. Missouri and Taylor v. Louisiana, supra, which hold that the Sixth Amendment right requires trial by a jury drawn from a fair cross section of the community, regardless of whether the defendant on trial is a member of the class suffering from substantial underrepresentation. Those cases, of course, dealt only with a challenge to the petit, or trial jury, not to a grand jury.

This is not to say that a state defendant may never challenge the composition of a grand jury. Although he has no Fifth Amendment right to indictment by a grand jury, if the state provides such a procedure, it must do so in compliance with the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment equal protection analysis applicable to grand juries, however, is quite different from the Sixth Amendment fair cross section

analysis applicable to petit juries. The standard has been stated by the Supreme Court as follows:

> Thus, in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. Castaneda v. Partida, 430 U.S. 482, 494 (1976).

One earlier case, Peters v. Kiff, 407 U.S. 493 (1972), a plurality opinion, permitted challenge by a state defendant of a grand jury upon the basis of exclusion of persons of a race other than his. That case, however, involved arbitrary exclusion rather than underrepresentation, and was decided upon a Fourteenth Amendment due process rationale.

The Castaneda rule, quoted above, is the federal Constitutional rule as

presently interpreted by the Courts. The Fifth, now Eleventh, Circuit Court of Appeals has applied it as recently as Guice v. Fortenberry, 633 F.2d 699 (5 Cir. 1980).

It was the Castaneda rule which was applied by the Florida Third District Court of Appeal, when it held that Giardino lacked standing to make the claim presented in this opinion. That Court, in affirming Giardino's conviction, cited Barnason v. State, 371 So.2d 680 (Fla. 3 Dist. 1979). The Barnason case is a thoughtful opinion quoting the Castaneda rule, and pointing out, at footnote 2, Barnason v. State, supra at 681, the distinction in the various Constitutional rights discussed in this Report.

Giardino, as a white, non-Latin, has no standing to challenge the grand jury which indicted him upon the basis that it

was selected from lists on which Blacks and Latins were substantially under-represented.

Because no showing has been made that Candido Giardino is in custody in violation of the Constitution or laws of the United States, it is the recommendation of the Magistrate that this petition for writ of habeas corpus should be denied.

Pursuant to 28 U.S.C. §636(b)(1)(C) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts, the parties may serve and file objections to this Report with the District Judge within ten days after being served with a copy of the Report.

DATED: November 19, 1981

Charlene H. Sorrentino
UNITED STATES MAGISTRATE

cc: Michael Zelman, Ass't
Public Defender

Anthony C. Musto, Ass't
Attorney General

SUPREME COURT OF FLORIDA

FRIDAY, AUGUST 22, 1980

CANDIDO GIARDINO,

Petitioner,

vs.

CASE NO. 58,541

District Court of Appeal, 3d District - No. 79-549

STATE OF FLORIDA,

Respondent.

_____/

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla.R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App. P. 9.330(d).

SUNBERG, C.J., ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Wilkie D. Ferguson, Jr., Judge
Hon. Richard P. Brinker, Clerk

Lawrence E. Besser, Esquire
Flynn, Rubio & Tarkoff
Anthony C. Musto, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Phyllis Bambury
Deputy Clerk

CANDIDO GIARDINO, Appellant

vs.

THE STATE OF FLORIDA, Appellee

No. 79-549.

District Court of Appeal of Florida, Third District

December 4, 1979.

Rehearing Denied January 8, 1980.

Appeal from Circuit Court, Dade County; Wilkie D. Ferguson, Jr., Judge

Flynn, Rubio & Tarkoff and Vincent J. Flynn, Miami, for appellant.

Jim Smith, Atty. Gen., and Anthony C. Musto, Asst. Atty. Gen., for appellee.

Before PEARSON, HUBBART and NESBITT, JJ.

PER CURIAM.

The judgment of conviction and sentence appealed from is affirmed upon a holding that (a) the defendant lacks standing to assert the claim, in a motion to dismiss the indictment herein, that the composition of the grand jury which indicted him denied him equal protection,

Barnason v. State, 371 So.2d 680 (Fla. 3d DCA 1979), and (b) the denial of the motion for a severance of defendants and the exclusion of certain evidence at trial presents no reversible error. Manson v. State, 88 So.2d 272 (Fla. 1956); Ballard v. State, 323 So.2d 297 (Fla. 3d DCA 1975); §924.33, Fla.Stat. (1977); See Zamora v. State, 361 So.2d 776, 779 (Fla. 3d DCA 1978).

ROBERT G. BARNASON, Appellant,

vs.

THE STATE OF FLORIDA, Appellee.

No. 78-578

District Court of Appeal of Florida, Third District.

May 15, 1979.

Rehearing Denied June 15, 1979.

Bennett H. Brummer, Public Defender and Robert L. Moore, Special Asst. Public Defender; Greene & Cooper and Sharon L. Wolfe, Miami, for appellant.

Jim Smith, Atty. Gen. and Susan C. Minor, Asst. Atty. Gen. for appellee.

Before HAVERFIELD, C.J., and PEARSON and SCHWARTZ, JJ.

SCHWARTZ, Judge.

The defendant appeals from the judgment and sentence entered after a jury found him guilty of second degree murder. We find that neither of the contentions he advances for reversal has merit.

Barnason, a white non-Latin, first argues, relying almost entirely on Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), that Blacks and Latins were substantially underrepresented on the grand jury which indicted him.[1] We need not reach the merits of this contention because, as the majority opinion in Castaneda itself holds, at 430 U.S. 494, 97 S.Ct. 1280, 51 L.Ed.2d 510:

[1]The members of the Dade County grand jury involved in this case were chosen by the circuit judges of the 11th circuit acting as grand jury commissioners pursuant to Fla.Laws Chs. 57-500 and 70-1000. The constitutionality of the system was upheld in Seay v. State, 286 So.2d 532 (Fla. 1973) and State v. Demetree, 213 So.2d 709 (Fla. 1968) over challenges which did not involve the contention and the attempted statistical showing of purported discrimination which were presented in this case.

> ". . .in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." [emphasis supplied]

Since the defendant is not a member of the race or group allegedly underrepresented on the grand jury, he clearly lacks standing to assert the claim that its composition denied him equal protection.[2]

[2]The rule as to standing is different when the defendant raises a claim that the petit jury which convicted him does not represent a "fair cross section o the community." Duren v. Missouri, __ U.S. __ 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The reason and constitutional basis for the distinction are explained in Justice Powell's dissenting opinion in Castaneda, 430 U.S. at 509, 510, 97 S.Ct. at 1287, 51 L.Ed.2d at 520. Compare also Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) in which the Supreme Court held that a white defendant may

Footnote 2 (cont'd) may challenge both his grand jury and petit jury on the ground that Blacks had been arbitrarily, systematically, and totally excluded solely by reason of race. As is shown by the rationale of Justice White's separate opinion in Peters in which Justices Brennan and Powell joined so as to make up a majority of the court concurring in the judgment, 407 U.S. at 505-507, 92 S.Ct. at 2169, 2170, 33 L.Ed.2d at 95-96, that situation is to be distinguished from the claim of grand jury underrepresentation involved in the Castaneda case and in this one.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment V of the Constitution of the United States provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, wherein actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascer-

> tained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV of the Constitution of the United States provides that:

> All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Title 18, United States Code, Section 243 provides:

No citizen possessing all other qualifications which are or may be pre-

scribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

Title 28, United States Code, Section 2254 provides inter alia that:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws of the United States.

CHAPTER 70-1000, LAWS OF FLORIDA

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 1 of the Chapter 57-550, Laws of Florida 1957, is amended to read:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000) or more, according to the last previous federal census.

Section 2. Section 2 of Chapter 57-550, Laws of Florida, 1957, is amended to read:

Section 2. There is hereby created a grand jury commission composed of the circuit judges of the judicial circuit encompassing the geographical boundaries of all counties referred to in section 1 of this act. The chairman of the grand

jury commission shall be elected by its members and the clerk of the circuit court shall be the secretary of the grand jury commission.

Section 3. All laws and parts of laws in conflict herewith are repealed.

Section 4. This act shall take effect September 1, 1970.

Vetoed by the Governor July 5, 1970.

Passed the Senate and House over the Veto October 9, 1970.

Filed in Office Secretary of State October 13, 1970.

CHAPTER 57-550, LAWS OF FLORIDA

Be It Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall apply and relate to all counties in the State of Florida having a population of four hundred fifty thousand (450,000), or more, according to the last preceding federal census.

Section 2. There is hereby created a Grand Jury Commission composed of ten members as follows: the Clerk of the Circuit Court, Chairman of the Board of County Commissioners, County Supervisor of registration, Clerk of the Criminal Court of Record, and the County Judge having served for the longest, continuous term shall, each, be members of the Grand Jury Commission, and the five (5) remaining members of the Grand Jury Commission shall be appointed by the

Governor, who shall appoint one (1) member each County Commissioners' district. The term of office of each of the appointive Grand Jury Commissioners shall be four (4) years and upon this act becoming a law the Governor of this state shall appoint three (3) Grand Jury Commissioners for a term of four (4) years and two (2) Grand Jury Commissioners for a term of two (2) years, and thereafter all appointive Grand Jury Commissioners shall be appointed for a term of four (4) years. There shall be a Chairman of the Grand Jury Commission to be elected by the members, and the Clerk of the Circuit Court shall be the Secretary.

Section 3. The Grand Jury Commission may employ such clerical assistants as may be necessary in order that it may function properly. The Board

of Commissioners of the County shall pay such assistants such sums as said Board may determine, and shall also furnish the Grand Jury Commission with such supplies and equipment as may be required in order to permit the proper functioning of the Grand Jury Commission. The compensation of such assistants, and the cost of such supplies and equipment, shall be paid out of the Fine and Forteiture Fund of the County.

Section 4. The grand jurors in each County in this population classification shall be paid the sum of five dollars ($5.00) for each day when in session, or in court, or such sum as the general laws of the State of Florida may provide for the payment of grand jurors, whichever may be the greater. Such payment shall be made as now provided by law. That in addition to all other

compensation provided by law, each grand juror shall receive the sum of five (5¢) per mile for every mile necessarily traveled in going from home to the courthouse, and return, when on official grand jury duty, whether attending Court, grand jury sessions or other grand jury meetings or business.

Section 5. The qualifications of persons to serve as grand jurors are as follows:

(a) Shall be a citizen of the United States of America, and a qualified elector and resident of the County.

(b) Shall be of sound mind, in possession of his, or her natural faculties and not infirm or decrepit.

(c) Shall not have been convicted of a felony or of a misdemeanor involving moral turpitude in any court within or without this state.

(d) Shall not have any pending criminal charges against him, or her, of a felony or a misdemeanor involving moral turpitude in any court within or without this State.

(e) Shall be of good moral character, and shall be free of any organized crime or with those associated therewith.

(f) Shall not be a member of any association or organization prohibited or declared to be subversive by the laws of the State of Florida or declared to be subversive by the Attorney General of the United States of America pursuant to law.

(g) Shall be intelligent, well informed and able to read and write the English language understandingly.

(h) Shall not be a public officer or employee of the United States of America, the State of Florida, or any county or city therein, but this prohibition shall

not apply to any person serving without compensation, pursuant to the provisions of the United States Training and Service Act, or any future draft law, nor to any person serving in the Militia or National Guard of this State.

(i) Attorneys-at-law shall not serve on the grand jury, and doctors of medicine, dentists and clergymen shall be excused upon request.

(j) Shall not have served on a grand jury in the County within a period of the last five (5) years.

Section 6. The Grand Jury Commission shall meet annually, on or before the first Monday in March of each year, and prepare a list of five hundred (500) names of persons qualified under the provisions of this act, and morally fit to serve as grand jurors, and shall file the same with the Clerk of the Circuit Court;

and the names of each of said persons shall be written upon a separate slip of paper and folded and placed, together with the list itself in a secure metal box to be known as the "GRAND JURY BOX", which shall be securely locked and sealed, and the names of one or more of the Grand Jury Commissioners, together with the date, shall be written across the seal, and the box shall be delivered to the Clerk of the Circuit Court, who shall securely keep the same in a safe place, and the key thereto shall be kept by the Grand Jury Commission.

In preparing a list of names of prospective grand jurors, as provided by this act, the Grand Jury Commission shall make such investigation as it may deem necessary to determine the qualifications and moral fitness of persons to serve upon the Grand Jury. That upon the GRAND JURY BOX becoming depleted of names, the

Grand Jury Commission shall immediately meet and refill the same, as provided by this act.

If the list of names of prospective grand jurors or the number of names of prospective grand jurors written on slips of paper and placed in the GRAND JURY BOX is more, or less than five hundred (500), it shall not affect the validity of the GRAND JURY BOX or any Grand Jury drawn therefrom.

Section 7. That the Grand Jury shall be drawn as provided by law, however, the members of the Grand Jury Commission shall be notified by the Clerk of the Circuit Court of the time and place of drawing the Grand Jury, and majority of the members of the Grand Jury Commission shall appear at the drawing of the Grand Jury, and be present when the seal on the GRAND JURY BOX is broken and the box unlocked and when the Grand Jury

is drawn, and thereafter the GRAND JURY BOX shall be locked and resealed by the Grand Jury Commissioners or so many thereof as are present. The Court shall draw from the GRAND JURY BOX a sufficient number of names as the Court determines to be necessary, not less than seventy-five (75), and summonses shall be sent by the Clerk of the Circuit Court to each prospective grand jury, by registered mail, return receipt requested, not less than thirty (30) days prior to the return date for their appearance in Court.

* * *

Section 12. This act shall take effect immediately upon its passage and approval by the Governor, or upon becoming a law without such approval.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 21, 1957.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5906

CANDIDO GIARDINO,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, etc., and JIM SMITH, Attorney General, etc.,

Respondent-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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ORDER

( ) The motion of Appellees, LOUIE L. WAINWRIGHT, ET AL., for stay and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(x) The motion of Appellees, LOUIE L. WAINWRIGHT, ET AL., for stay and stay of issuance of the mandate pending petition for writ of certiorari is GRANTED to and including June 5, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above

mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellees, LOUIE L. WAINWRIGHT, ET AL., for a further stay of the issuance of the mandate is GRANTED to and including_____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellees, LOUIE L. WAINWRIGHT, ET AL., for a further stay of the issuance of the mandate is DENIED.

PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE